IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 561 OF 2005

Union of India. ... Petitioner.

V/s.

1. The Janata Sahakari Bank Ltd.,
Pune.

2. Bharat Somchand Khona. ... Respondents.

B.M.Chatterjee with Y.S.Bhate and Y.R.Mishra
for the petitioner.

Shekhar Naphade with Ms.Kaushik i/b.
M/s.Ramanathsekhar & Co. for the respondents.

CORAM : V.C.DAGA AND J.P.DEVADHAR, JJ.

DATED : 27th April 2005.

P.C. :

. The petitioner is challenging the validity of the proclamation of sale issued by the Special Recovery Officer of the Janata Sahakari Bank Ltd, respondent No.1 herein; in exercise of powers under section 13(4)(a) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("Securitisation Act" for short) and rules 8(5) and 9(1) of the Security Interest (Enforcement) Rules, 2002.

2. The petitioner herein is the Commissioner of Income-tax having jurisdiction over the income tax assessment of the assessees through the Tax Recovery

Officer, Range 4(1) having his office at Mumbai. The respondent No.1 is a scheduled bank registered under the Maharashtra Co-operative Societies Act, 1960. The respondent No.2 is the assessee of the petitioner who is a tax defaulter. Pursuant to the assessment order dated 31st January, 1996 demand for Rs.1,10,76,684/- was raised against the petitioner and demand notice was served on 2nd February, 1996. In spite of the service of the demand notice, respondent No.2 failed to pay the assessed tax.

3. Since respondent No.2 - assessee became a tax defaulter, the petitioner had attached the property of respondent No.2 under Panchanama dated 11th April, 1997 in exercise of powers under rule 16 of Schedule-III of the Income-tax Act, 1961 ("Act" for short) for recovery of their tax dues.

4. It appears that during pendency of the appeal challenging assessment order before Commissioner of Income-tax (Appeals), respondent No.2 availed Cash Credit Facility to the tune of Rs.1,24,00,000/- and offered to mortgage immovable property, viz. Flat No.19, admeasuring 925 sq.ft. (carpet area) situated on the fourth floor in building known as "Fulgado Apartments" at Plot No.44 and 45, T.P.S.-III, City Survey Nos.388 and 389

along with parking spaces in the said apartment and more particularly situated at N.C.Kelkar Road, Dadar (West), Mumbai- 400 028 (hereinafter referred to as the "property" for short). Pursuant to his intention to offer security he delivered title deeds of the said property to the bank on 4th April, 1996 and agreed to execute and register memorandum of deposit of title deeds containing terms and conditions of the finance. However, for want of certificate under section 230-A of the I.T.Act, document though executed could not be registered. It was kept pending for registration by the Sub-Registrar, Mumbai. It was, ultimately, registered on 21st February, 2002 i.e. after deletion of section 230-A from the I.T.Act.

5. The respondent No.2 committed defaults in making repayment of cash credit facility availed from the respondent No.1 bank, consequently, in the year 1999 respondent No.1 filed dispute before 1st Co-operative Court, Mumbai bearing Case No.CC/I/100/1999 against respondent No.2. The said dispute culminated in an award in favour of respondent No.1 bank, operative part of which award reads as under:

> 1. Opponent do pay a sum of Rs.95,52,499,51/- along with interest at the rate of 21% from 16/2/99 till

the realisation of whole amount, to disputant.

2. Opponent is ordered to hand over the vacant and peaceful possession of Flat No.19 on the 4th floor and parking spaces Nos.2 and 9 in Fulgardo Apartments situated at Plot Nos.44 and 45, T.P.S. III, C.S.No.388 & 389, N.C. Kelkar Road, Dadar, Mumbai-28 to disputant bank.

3. Disputant bank is at liberty to sell the mortgaged flat and adjust the realisation against outstanding amount.

4. Opponent do pay costs of this dispute to the disputant and bear his own."

The respondent No.1 claimed to have obtained vacant and peaceful possession of the property in dispute from respondent No.2 pursuant to the award dated 3rd July, 2002 referred to hereinabove.

6. It appears that after enactment of Securitisation Act, the respondent No.1 - bank in exercise of powers under section 13(2) of Chapter III of the said Act decided to enforce its security and issued public notice in Marathi newspaper "Saamana" on 8th September, 2004 for sale of the said property. The respondent No.1, thus, issued proclamation of sale of the property on 22nd November, 2004; wherein auction of the property was notified and declared that auction would be held on 5th January, 2005. This proclamation of sale dated 22nd November 2004, as already stated hereinabove,

is a subject matter of challenge in the present writ petition filed under Article 226 of the Constitution of India claiming two reliefs reading as under:

(a) That this Hon'ble Court may be pleased to issue a writ of certioriari or a writ in the nature of certioriari or any other writ, order or direction under Article 226 of the Constitution of India calling for the records in relation to the Proclamation of Sale of the said Property as described in Para 2 of the Petition U/s.13(4)(a) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and Security Interest (Enforcement) Rules 8(5) &s 9(1) of 2002 issued by the Respondent through its Special Recovery Officer, and after perusing the legality and validity thereof, quash and set aside the said Proclamation of Sale of the said Property, being Exhibit "O" annexed hereto;

(b) That this Hon'ble Court may be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of India ordering and directing the Respondent No.1 to forthwith hand over the possession of the said Property to the Petitioner so as to enable the Petitioner to auction the said Property as described in Para 2 of the Petition according to the provisions of the Income Tax Act, 1961 and the Rules framed therein as the said Property was attached by the Petitioner by virtue of ITCP-16, dated 11-04-1997 towards the realization of the Income Tax dues to be recovered from the Respondent No.2;

7. At the outset, Mr.Chatterjee, learned counsel appearing for the petitioner/revenue fairly conceded that no relief can be granted by this Court pursuant to prayer clause (b) of the petition. In view of this statement, what remains for

consideration is relief claimed in prayer clause (a) of the petition, which seeks to challenge legality and validity of the proclamation of sale dated 22nd November, 2004.

8. Mr.Chatterjee in support of his surviving prayer submits that the property in question being attached by the Income-tax Department pursuant to the provisions of Schedule-II of the Income Tax Act, 1961 ("I.T.Act" for short) claim of Income-tax Department will rank higher in priority than the respondent No.1 - bank. Secondly, he submits that provisions of Securitisation Act are not applicable to the facts of the present case since equitable mortgage itself was in breach of section 230A of the I.T.Act which was applicable at the relevant time i.e. when the memorandum of equitable mortgage was presented for registration before Sub-Registrar of Assurances. He submits that the registration of memorandum of equitable mortgage even after deletion of section 230A from the Income-tax Act cannot be said to be valid in absence of compliance of section 230-A of the I.T.Act.

Per Contra :
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9. Mr.Shekhar Naphade, learned senior counsel appearing for respondent No.1- bank submits that the

petition itself is not maintainable since an aggrieved party has an alternate efficacious remedy by way of appeal under section 17 of the Securitisation Act. He further submits that equitable mortgage in favour of the bank was perfectly legal and valid and no fault can be found with the said security. He further submits that as per rule 68B of Schedule-II the attachment of the property under rule 16 automatically comes to an end after a period of three years from the date of attachment. In the instant case, the attachment by the Income-tax Department in exercise of powers under rule 16 of Schedule-II was under Panchanama dated 11th April, 1997. Consequently, the said attachment has automatically come to an end after expiry of three years from the date of the order of attachment. He, thus, submits that as on date the Income-tax Department has no right to proceed against the property so as to challenge scheduled auction of the property at the instance of respondent No.1 - bank.

10. Mr.Naphade, alternatively, submits that so far as the attachment of the property by the petitioner is concerned, it was only in respect of 50% interest of the assessee in the property because the remaining 50% belongs to the wife of respondent

No.2 who is not a tax defaulter; whereas the property in possession of the bank is entire property with entire interest of property owners. He further submits that so far as the right of the petitioner to proceed against the property is concerned, the said issue can only be decided by the appellate forum under section 17 of the Securitisation Act as the said Act has overriding effect over the I.T.Act as such the forum provided under the Securitisation Act is the only forum available to the parties to ventilate their grievances, if any. In this view of the matter, he submits that the petition is liable to be dismissed on this count.

Consideration :

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11. Having heard rival parties, it is not in dispute that the action of respondent No.1 - bank taken under the provisions of the Securitisation Act is subject matter of challenge in the petition. The said Act provides machinery for ventilating grievances of any person. This Act has been given an overriding effect which is clear from section 25 of the Securitisation Act. As per section 37 of the said Act application of other laws for the time being in force is not barred. Therefore, the right of the petitioner under I.T.Act can conveniently be gone into by the appellate forum in appeal, if filed

under section 17 of the Securitisation Act which, in the case of **Maradia Chemicals Ltd. v. Union of India**, 2004 4 SCC 311, is held to be in the nature of original proceedings. If that be the case where the petitioner has an alternate efficacious remedy, it would be reasonable to relegate the petitioner to avail that alternate remedy as such this is not fit case to invoke extra ordinary writ jurisdiction of this Court. Hence petition is liable to be dismissed keeping all rival contentions of the rival parties open.

12. In the result, petition is dismissed in limine for the reasons recorded herein with no order as to costs.

13. At this stage, the learned counsel appearing for the petitioners submits that interim relief granted by this Court on 4th January, 2005 may be continued for a period of six weeks from today. The respondents are not represented by any counsel to oppose this prayer. In this view of the matter, we see no difficulty in granting this prayer. Accordingly, interim relief granted by an order dated 4th January, 2005 stand extended by another six weeks from today.

(J.P.Devadhar, J.) **(V.C.Daga, J.)**